

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

GALE NORTON, et al.,

Defendants.

Case No. C05-1835L

ORDER ON PLAINTIFF'S  
MOTION TO COMPEL

**I. Introduction**

This matter comes before the Court on “Plaintiff’s Motion to Compel Defendants’ Initial Disclosures and for an Award of Costs and Attorneys’ Fees” (Dkt. # 16). Plaintiffs Seattle Audubon Society and Kittitas Audubon Society (hereinafter “Audubon” or “plaintiff”) seek to compel defendants Gale Norton, Secretary of the Interior and H. Dale Hall, Director of the U.S. Fish and Wildlife Service (hereinafter “the Secretary” or “defendant”) to comply with the initial disclosure requirements from the Federal Rules of Civil Procedure. Fed. R. Civ. P. 37(a)(2)(A). Defendant contends that because this action will be resolved on the basis of the administrative record, it needs only to submit a copy of the administrative record pursuant to the local rules.

1 Local Rule CR 79(h).<sup>1</sup>

## 2 **II. Background Facts & Procedure**

3 The instant discovery dispute arises out of the Audubon's action against the Secretary for  
4 failing to develop and implement a recovery plan for the Northern Spotted Owl pursuant to the  
5 Endangered Species Act ("the ESA" or "the Act"). 16 U.S.C. § 1533(f) (recovery plan  
6 requirement). The Act requires that the Secretary develop a recovery plan after a species is  
7 listed as threatened or endangered, though includes no timeline for this mandate. 16 U.S.C.  
8 1533(a)(1). The Northern Spotted Owl was listed as threatened on June 26, 1990. 55 Fed. Reg.  
9 26114. Almost sixteen years later, the Secretary has not yet implemented a recovery plan.

10 Plaintiff relies on two statutory provisions in support of the instant action. First, plaintiff  
11 argues that the Secretary's inaction is subject to a citizen suit pursuant to the provisions of the  
12 ESA. 16 U.S.C. § 1540(g)(1)(A), (C). These provisions allow "any person" to "commence a  
13 civil suit on his own behalf" against the government for violation of the ESA or for failure to  
14 perform an act or duty under § 1533(f). Second, plaintiff argues that the Secretary's inaction is  
15 actionable under the Administrative Procedure Act ("the APA"), allowing judicial review to  
16 "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

17 The parties disagree as to the extent of discovery permitted under both causes of action.  
18 Plaintiff contends that the citizen suit provision of the ESA, by referencing a "civil suit,"  
19 provides statutory authorization for a full civil action with discovery beyond the limitations of an  
20 administrative record. Moreover, the statute specifically uses "substantial evidence"  
21 language—which is normally associated with administrative record-limited judicial reviews—in  
22 reference to another section of the citizen suit provision, and not to the section relevant to the  
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24 <sup>1</sup> Defendant notes that it did not comply with this rule initially because it was engaged in  
25 settlement negotiations with plaintiff, but intends to comply upon the resolution of the instant  
26 dispute.

1 instant suit. Defendant finds the statute inconclusive, and instead relies on precedent that seems  
2 to suggest a more limited review. Cabinet Mountain Wilderness v. Peterson, 685 F.2d 678, 685  
3 (D.C. Cir. 1982).

4 As to the APA cause of action, plaintiff argues that Ninth Circuit precedent allows  
5 extensive discovery where the agency is sued for its failure to make any decision, rather than for  
6 having made the wrong decision. E.g., Independence Mining Co. v. Babbitt, 105 F.3d 502,  
7 511–12 (9th Cir. 1997). Defendant concedes that Ninth Circuit cases have allowed record  
8 supplementation in actions under the “unreasonably delayed” provision of the APA, but that a  
9 factual inquiry into each of those cases demonstrates that the supplementation was always by the  
10 government agency, and always for the limited purpose of explaining the agency’s justification  
11 for its delay. Moreover, the statute is relatively unambiguous in its statement that the  
12 administrative record should serve as the only basis for the Court’s assessment of the validity  
13 agency’s action or inaction, subject to a few judicially created exceptions. 5 U.S.C. 706 (“In  
14 making the foregoing determinations, the court shall review the whole record or those parts of its  
15 cited by a party . . .”).

### 16 **III. Discussion**

#### 17 **A. Statutory Authorization for the Instant Suit**

18 Although plaintiff does not purport to allege the causes of actions in its complaint in the  
19 alternative, it is clear that these causes of action cannot be pursued simultaneously. The Ninth  
20 Circuit has held that where “the ESA citizen suit provision creates an express, adequate remedy .  
21 . . the APA does not govern the plaintiff’s claims.” Wash. Toxics Coal. v. EPA, 413 F.3d 1024,  
22 1034 (9th Cir. 2005). This is so because the APA “by its terms independently authorizes review  
23 only where ‘there is no other adequate remedy in a court.’ ” Bennet v. Spear, 520 U.S. 154,  
24 161–62 (1997) (quoting 5 U.S.C. § 704); cf. Natural Res. Def. Council, Inc. v. Dept. of Interior,  
25 13 Fed.Appx. 612, \*621 (9th Cir. 2001) (adhering to ESA, not APA, injunctive relief standards  
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1 in an action brought under both the ESA citizen suit provision and the APA). In the instant case,  
 2 plaintiff alleges that the Secretary has failed to fulfill its duty pursuant to §1533(f), and the ESA  
 3 provides for citizen suits “where there is a failure of the Secretary to perform an act or duty  
 4 under [§ 1533(f).]” Therefore, discovery should proceed according to the requirements of the  
 5 ESA, not the APA.

#### 6 **B. Scope of Review Under the ESA Citizen Suit Provision**

7 The Court’s analysis of the availability of discovery for an action proceeding under the  
 8 ESA citizen suit statutory provision must begin with the statutory text. Unfortunately, the ESA  
 9 offers no guidance. Many courts, faced with this lack of information, have returned to the APA  
 10 for guidance: “[C]ircuits which have considered the issue have adopted standards of review  
 11 based on the relevant portions of the APA governing what the agency has done (or failed to  
 12 do).” Water Keeper Alliance v. Dept. of Defense, 271 F.3d 21, 31 (1st Cir. 2001) (detailing the  
 13 decisions of a number of circuits employing APA standards for a variety of ESA violations  
 14 litigated pursuant to the citizen suit provision).<sup>2</sup> The Supreme Court recommends this approach:  
 15 “Indeed, in cases where Congress has simply provided for review, without setting forth the  
 16 standards to be used or the procedures to be followed, this Court has held that consideration is to  
 17 be confined to the administrative record and that no de novo proceeding may be held.” United  
 18 States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963).

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 20 <sup>2</sup> The Court notes that this refers to the *standard*, not *scope*, of review. However, the  
 21 Court finds the provision equally ambiguous as to scope and standard, and notes that the parties  
 22 failed to make any persuasive arguments to the contrary. See Plaintiff’s Motion at 7–8  
 23 (describing the *scope* as “de novo,” a term usually used in reference to standards of review);  
 24 Defendant’s Response at 10–11 (describing the *standard of review* as not de novo, but not  
 25 addressing scope); and Plaintiff’s Reply at 4–5 (making the most coherent, but ultimately  
 26 unpersuasive, arguments for unlimited discovery). Moreover, in its reply brief, plaintiff  
 27 tactically omits damaging language from Chandler v. Roudebush, that undermines its argument.  
 28 425 U.S. 840, 862 n.37 (1976) (citing the “confined to the administrative record” language from  
United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963)).

1           Notwithstanding this practice, another court in this district flatly refused to adopt “the  
2 peculiar doctrines” of the APA, and the Ninth Circuit ratified this exercise of discretion. Wash.  
3 Toxics Coal. v. EPA, CV01-132C, 2002 U.S. Dist. LEXIS 27654, \*17 (W.D. Wash. July 2,  
4 2002) (Coughenour, J.) affirmed by Wash. Toxics Coal., 413 F.3d at 1034. Ultimately,  
5 however, the scope of the record to be admitted for an ESA citizen suit is a question of the  
6 district court’s discretion, and this Court concludes that employing the APA evidentiary  
7 guidelines is a valid exercise thereof. See, e.g., San Francisco BayKeeper v. Whitman, 297 F.3d  
8 877, 886 (9th Cir. 2002) (employing abuse of discretion standard for district court’s decision to  
9 consider evidence outside the administrative record).

### 10 **C.     Scope of Review Under the APA**

11           Because plaintiff argues that defendant has violated the ESA by failing to implement a  
12 recovery plan within a reasonable period of time after listing a species as threatened, this action  
13 is best analogized to an “unreasonably delayed” action under § 706(1) of the APA. Thus, the  
14 Court will exercise its discretion to employ the scope of review as would be set forth in the APA  
15 for a 706(1) failure to act action. The statutory language of § 706(1) is unambiguous: “In  
16 making the foregoing determinations, the court shall review the whole record or those parts of it  
17 cited by a party . . . .” 5 U.S.C. § 706(1). The “whole record” language refers to the  
18 administrative record. See Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44 (1985).

19           Although the statutory language is clear, the limitation of the scope of review to the  
20 administrative record is subject to some judicial exceptions:

21           We have, however, crafted narrow exceptions to this general rule. In limited  
22 circumstances, district courts are permitted to admit extra-record evidence: (1) if  
23 admission is necessary to determine “whether the agency has considered all  
24 relevant factors and has explained its decision,” (2) if “the agency has relied on  
25 documents not in the record,” (3) “when supplementing the record is necessary to  
26 explain technical terms or complex subject matter,” or (4) “when plaintiffs make a  
27 showing of agency bad faith.” These limited exceptions operate to identify and  
28 plug holes in the administrative record.

The Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (internal citations omitted).

1 While plaintiff has identified numerous circumstances where courts have allowed  
2 supplementation in a 706(1) action, all of the incidents fall within these established categories,  
3 and are not manifestations of a precedential preference for unlimited discovery in unreasonable  
4 delay actions. See San Francisco BayKeeper, 297 F.3d at 886 (allowing limited  
5 supplementation by agency to provide justification for agency's inaction); Friends of the  
6 Clearwater v. Dombeck, 222 F.3d 552, 560–61 (9th Cir. 2000) (allowing limited  
7 supplementation by agency for purpose of proving that action was moot).

8 This decision does not preclude the possibility of the use of these exceptions in the  
9 instant action. Indeed, it seems clear that in cases where plaintiff complains of a failure to act,  
10 there is a greater chance that some extraneous piece of information might be necessary to shed  
11 light on the agency's inaction—there simply are more holes in the administrative record for the  
12 parties to identify and plug. In these types of actions, the Ninth Circuit has seen fit to approve  
13 of efforts by both parties to supplement the administrative record. Independence Mining, 105  
14 F.3d at 511–12 (“Accordingly, the district court was not prohibited from considering [the  
15 agency's supplemental memo], especially where the court permitted *both sides* to submit  
16 supplemental evidence.” (emphasis added)). This supplementation, however, is best pursued on  
17 a case-by-case basis, using the administrative record as the presumptive limitation of scope.

#### 18 **D. Revised Scheduling Procedure**

19 The resolution and timing of the instant order requires the Court to modify its scheduling  
20 order of March 7, 2006 (Dkt. # 15). The new order will set forth deadlines for the government  
21 to submit the administrative record and for the parties to move to supplement the record, as  
22 necessary. The Court will issue a revised scheduling order immediately following the instant  
23 order.

#### 24 **IV. Conclusion**

25 For the foregoing reasons, IT IS HEREBY ORDERED that “Plaintiff’s Motion to  
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1 Compel Defendants' Initial Disclosures and for an Award of Costs and Attorneys' Fees" (Dkt. #  
2 16) is GRANTED IN PART and DENIED IN PART, as follows: (1) plaintiff's request for a  
3 holding that judicial review is not limited to the administrative record is granted to the extent  
4 that the permissibility of supplementation will be determined on a case-by-case basis in  
5 accordance with the relevant, limited exceptions; (2) plaintiff's request for initial disclosures is  
6 denied; (3) plaintiff is not entitled to discovery; (4) plaintiff's request for a new case schedule is  
7 granted per the schedule to be set forth in the subsequent order; and (5) plaintiff's request for  
8 attorney's fees is denied.

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10 DATED this 24th day of May, 2005.

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13 Robert S. Lasnik  
14 United States District Judge  
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